

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN PAUL WESTBERG,

Defendant-Appellant.

UNPUBLISHED

January 13, 2005

No. 250334

Ottawa Circuit Court

LC No. 02-026430-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529, breaking and entering a building with intent to commit larceny, MCL 750.110, and conspiracy to commit breaking and entering, MCL 750.157a. The trial court sentenced defendant to concurrent terms of 180 to 480 months in prison for the armed robbery conviction, 72 to 120 months for the breaking and entering conviction, and 72 to 120 months for the conspiracy conviction. We affirm.

This case arose after defendant and an accomplice, Joshua Powell, allegedly broke into a building on the campus of Grand Valley State University in the early morning of August 26, 2002, while a second accomplice, Ernesto Soto, stood guard. Once inside, they assaulted Michael Jenkins, the lone computer operator on duty, and took money stored in the building.

Defendant contends that the prosecution presented insufficient evidence to sustain his convictions. The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The scope of review remains the same whether the evidence presented is direct or circumstantial. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

Under MCL 750.529, the elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or an article used or fashioned in a manner to lead the person so assaulted to

believe it to be a dangerous weapon. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). In the instant case, both Jenkins and Powell testified that defendant assaulted Jenkins with a pry bar and that Powell and defendant stole money from the building where Jenkins was working.

According to defendant, the prosecution failed to establish that Jenkins had possession or control of the money or that it was taken from his presence. In an armed robbery case, the prosecution need not establish that the victim actually owned the property taken. *Id.* Rather, it must show that “the property was taken in the victim’s ‘presence’ and that the victim’s right to possess the property was superior to the defendant’s right to possess it.” *Id.* For the purpose of a conviction under MCL 750.529, an item is within the presence of a victim if it is within his reach, inspection, observation or control, so that he could, if not overcome by violence or prevented by fear, retain his possession of it. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997). In this case, Jenkins, the computer operator, was the sole employee on duty at the time of the break-in. While he did not own the money taken from the building, his right to possess it, as an employee of the university, was superior to defendant’s. Additionally, even though the victim primarily worked in one office, he had access to the entire hall and went to investigate when he heard glass breaking. Although the victim was not in the part of the building where the money was stored when defendant and Powell assaulted him, they only located the money after questioning him. Based on this, a rational jury could have inferred that defendant and Powell took the money from an area subject to the victim’s inspection, observation or control. We therefore find that the prosecution presented sufficient evidence to establish that defendant took the money from the victim’s presence.

Defendant also contends that the prosecution presented insufficient evidence to support his conspiracy conviction. Conspiracy is defined as a partnership in which two or more individuals voluntarily agree “to effectuate the commission of a criminal offense.” *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). Defendant argues that the testimony presented in the instant case shows that he, Powell, and Soto agreed to commit the crime well before the date of the break-in, but the information in the instant case states that the offense occurred on or about August 26, 2002. Defendant correctly notes that because “[t]he gist of the offense of conspiracy lies in the unlawful agreement,” a conspiracy is “‘complete upon formation of the agreement.’” *Id.* at 345-346, quoting *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982). Because the evidence shows that the conspiracy was complete before August 26, defendant argues that the prosecution failed to establish that the crime occurred on the date charged in the information. We disagree.

Defendant’s argument fails to fully consider the nature of the crime of conspiracy. “The crime of conspiracy is a continuing offense; it ‘is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy.’” *People v Denio*, 454 Mich 691, 710; 564 NW2d 13 (1997), quoting *United States v Castro*, 972 F2d 1107, 1112 (CA 9, 1992), overruled in part *United States v Jimenez Recio*, 537 US 270; 123 S Ct 819; 154 L Ed 2d 744 (2003). Under our Supreme Court’s holding in *Justice*, the crime was complete at the time defendant first entered into an agreement to break into the university, and the prosecution could have charged him with conspiracy at that point. But because conspiracy constitutes a continuing offense and there was no evidence that defendant ever attempted to withdraw from or disavow the agreement, a rational jury could logically infer that the conspiracy

was still ongoing on the date defendant and Powell actually committed the break-in. Therefore, we find that the prosecution presented sufficient evidence to establish that the crime occurred on the date charged in the information.

Defendant also argues that the prosecution failed to present credible evidence showing that he was the person involved in the crimes because both of his alleged co-conspirators had a strong motive to lie. Although evidence established that defendant purchased masks, walkie-talkies, and a police scanner, which were items that were used by the perpetrators, he explained that he purchased these items for playing paintball and argued that the prosecution failed to present any evidence to the contrary. However, the prosecution need not negate every reasonable theory consistent with defendant's innocence. *Nowack, supra* at 400. And regardless of their possible motives for lying, both Powell and Soto identified defendant as the third person involved in the break-in. When examining the sufficiency of the evidence, this Court must view all factual conflicts, including determinations as to the credibility of witnesses, in the light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Furthermore, the credibility of an accomplice constitutes a question of fact, and a "jury may convict on the basis of accomplice testimony alone." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Thus, the prosecution presented sufficient evidence for a rational jury to conclude beyond a reasonable doubt that defendant participated in the crimes charged.

Defendant next asserts that the prosecution engaged in numerous acts of prosecutorial misconduct during its closing arguments. A claim of prosecutorial misconduct is a constitutional issue that is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, because defendant failed to preserve the issue, we review it only for plain error affecting his substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003).

Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). They are given wide latitude and need not confine their arguments to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). In the instant case, the prosecution argued that defendant sat in jail for eight months without saying anything about his alibi. We find that this statement and the numerous other statements that defendant contends were improper in the instant case constituted fair comments on the evidence presented. Furthermore, "[b]ecause defendant testified at trial, the *prosecutor's* comments did not, and could not, impinge on defendant's Fifth Amendment right not to testify." *People v Fields*, 450 Mich 94, 109; 538 NW2d 356 (1995). None of the prosecution's comments constituted plain error, and we decline to further review the issue. Furthermore, because defense counsel need not "make a meritless motion or a futile objection," defendant's attorney did not err in failing to object to the prosecutor's remarks. *Goodin, supra* at 433.

Defendant also contends that his trial counsel was ineffective for failing to present testimony from more than one alibi witness. Because defendant failed to move for an evidentiary hearing or a new trial below, our review of the issue is limited to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Where the

record does not contain sufficient detail to support an ineffective assistance claim, the defendant waives the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Rodgers, supra* at 715. In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

In the instant case, defendant's alibi notice lists four potential witnesses other than the one who testified at trial. The record does not contain any information concerning what the substance of their testimony would have been or how their testimony would have aided defendant's case. Moreover, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, and the failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). In light of the fact that the substance of the four potential alibi witnesses is unknown, we cannot conclude that defense counsel's failure to call the witnesses deprived defendant of a substantial defense. Defendant cannot overcome the strong presumption that that defense counsel's decision not to call these witnesses constituted sound trial strategy.

Defendant next asserts that defense counsel was ineffective because defense counsel failed to contact him between his preliminary examination in October of 2002 and mid January of 2003. Defendant contends that, although defense counsel contacted defendant a few days before his original trial date, he was forced to obtain an adjournment because he was unprepared. However, nothing in the record indicates that defense counsel's preparation for trial was objectively unreasonable or that the adjournment prejudiced defendant. Consequently, we cannot conclude that defendant received ineffective assistance of counsel on this basis.

Defendant also asserts that, on or about January 14, 2003, he sent the trial court a letter requesting a change of counsel. He contends that, by failing to respond, the trial court denied his request and abused its discretion. Because defendant failed to preserve this issue, we review it for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). No mention of the alleged request for substitute counsel appears in the record and the lower court file contains no correspondence between defendant and the trial court. A party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Because we have no way of knowing whether defendant actually made this request or whether it was considered by the trial court, we cannot find plain error and decline to review the issue.

Defendant next contends that the trial court committed reversible error by failing to give a cautionary instruction regarding the testimony of a third alleged accomplice. Defense counsel expressly approved the instructions given to the jury; therefore, defendant has waived this issue and there is no error for this Court to review. *People v Carter*, 462 Mich 206, 216-219; 612 NW2d 144 (2000).

Additionally, defendant argues that the trial court erred in scoring Offense Variable Seven (OV 7), aggravated physical abuse. This variable requires a trial court to score fifty points if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37. A sentencing court has discretion in determining the number of points to be scored under an offense variable. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We uphold a sentencing court’s scoring decisions where there is any evidence in the record to support them. *Id.*

In scoring OV 7 at fifty points, the trial court noted that the testimony at trial showed that defendant, armed with a pry bar, repeatedly struck the victim in the head. Defendant continued to hit the victim’s legs with this weapon after the victim attempted to protect himself by crawling under a table. This beating continued for approximately 5 to 10 minutes, even after the victim stated he was finished resisting and told defendant where to locate the money. The police officer who responded to the incident stated that the victim feared he was going to die, was bleeding excessively, and lost consciousness. We reject defendant’s contention that the trial court erred in scoring defendant fifty points for OV 7. The trial court’s description of the offense is supported by the testimony given at trial by the victim, the responding officer, and Powell. Because there was evidence that defendant treated the victim with excessive brutality, the evidence supports a score of fifty points for OV 7.

Defendant also asserts that the trial court erred in scoring Offense Variable Fourteen (OV 14), regarding the offender’s role in the crime. MCL 777.44. This variable requires the trial court to assess ten points where “[t]he offender was a leader in a multiple offender situation.” MCL 777.44(1)(a). If three or more offenders were involved, the court may determine that more than one of them acted as a leader. MCL 777.44(2)(b). And “[t]he entire criminal transaction should be considered when scoring this variable.” MCL 777.44(2)(a). In scoring this variable, the trial court stated that, although defendant and Powell may have been co-leaders, defendant was a leader in relation to Soto, the third participant in the crime. Soto’s testimony that defendant recruited him to serve as a lookout during the break-in provides some evidence to support this determination. Thus, we find that the trial court did not err in scoring ten points for OV 14.

Defendant filed a supplemental brief in which he argues that when scoring the sentencing guidelines, the trial court relied on facts not found by the jury in violation of *Blakely v Washington*, 542 US __; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has stated that *Blakely*, which reviewed the state of Washington’s determinate sentencing scheme, does not apply to Michigan’s indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Accordingly, we decline to further address this issue.

Because the trial court did not err in calculating defendant’s score under either OV 7 or OV 14 and defendant’s sentences fall within the range provided by the statutory guidelines, we must affirm his sentences. MCL 769.34(10).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello